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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MATTEL, INC.,

Plaintiff and Appellant,

v.

LUCE, FORWARD, HAMILTON &
SCRIPPS et al.,

Defendants and Respondents.

B143260

(Los Angeles County
Super. Ct. No. BC225556)

APPEAL from an order of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Reversed.

Quinn Emanuel Urquhart Oliver & Hedges, Adrian M. Pruetz, Edith Ramirez and A. Eric Bjorgum for Plaintiff and Appellant.

Greines, Martin, Stein & Richland, Rex S. Heinke, Carol K. Lysaght and Jessica M. Weisel for Defendant and Respondent Luce, Forward, Hamilton & Scripps.

White O'Connor Curry Gatti & Alvanzado, James E. Curry and Jonathan H. Anschell for Defendant and Respondent James B. Hicks.

Mattel, Inc. appeals from an order granting the motions of defendants Luce, Forward, Hamilton & Scripps, LLP (Luce Forward) and its general partner, James B. Hicks,¹ to strike its complaint for defamation and unfair competition pursuant to Code of Civil Procedure section 425.16, subdivision (b).² Mattel sought redress for allegedly defamatory statements made by defendants in connection with litigation between Mattel and the CDC defendants relating to CDC's distribution of dolls claimed by Mattel to be similar to their Barbie doll. Respondents represented the CDC defendants in that litigation.

Mattel contends that the trial court erred in granting the SLAPP motions because (1) the Anti-SLAPP statute did not protect respondents because their conduct was illegal, and (2) Mattel established the probability of success in its lawsuit because the statements were not privileged as "fair and true report[s]" by a "public journal," pursuant to Civil Code section 47, subdivision (d).

Because we find that Mattel established a probability that it will prevail on at least one claim of defamation, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Mattel and the CDC defendants were involved in three separate federal lawsuits in which respondents represented Claudene or Harry, and CDC. The cases

¹ Mattel's lawsuit was also filed against Claudene Christian (Claudene) and her father Harry R. Christian (Harry), individually and doing business as Collegiate Doll Company (CDC), who are not parties to this appeal. We refer to Harry, Claudene and CDC collectively as the "CDC defendants," Luce Forward and Hicks as "respondents" and all of them collectively as "defendants."

² All statutory references are to the Code of Civil Procedure unless otherwise specified. Section 425.16 will sometimes be referred to as the "Anti-SLAPP Statute" and a special motion to strike as a "SLAPP motion." SLAPP is the acronym for "Strategic Lawsuits Against Public Participation." Generally, SLAPP lawsuits are undertaken primarily to deter the exercise of political rights. (*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741.)

involved the manufacture of dolls, and allegations of copyright and trade dress infringement relating to Mattel's Barbie doll.

While a student at the University of Southern California (USC) in 1990, Claudene created a doll dressed in a USC cheerleader uniform which she attempted to sell in the USC bookstore. Because USC was concerned that the dolls appeared to be similar to Mattel's Barbie doll, the USC Licensing Coordinator wrote to Mattel requesting confirmation that Claudene's doll did not infringe on Mattel's rights. Mattel responded that it had "examined the sample and wouldn't object to its sale, as long as it isn't advertised as a BARBIE brand doll."

Claudene went on to establish a business selling cheerleader dolls to universities and colleges all over the country. In 1996, Mattel received a letter from CDC requesting Mattel's consent to the release of CDC's cheerleader dolls which were being detained by the United States Customs Service as a possible copyright infringement. Mattel examined a sample doll and replied that this doll was different from the doll that it had previously approved. Mattel learned that sales of the CDC cheerleader dolls had expanded to dozens of universities and colleges and that the dolls were being manufactured by a different company than had produced the earlier doll. Mattel also learned that a college bookstore had advertised the CDC doll as a "Barbie."

Mattel replied to CDC that Customs could release the dolls under certain conditions: that CDC agree not to make any further changes to them, that CDC get agreements in writing from their vendors not to promote or market the dolls as "Barbies," and that CDC provide Mattel with photocopies of the agreements. CDC did not agree to these conditions.

Mattel then received formal notice from the Customs Service about the detention of a shipment of dolls "which [might] constitute a violation of [Mattel's] copyright." The notice stated that the dolls would be released to CDC unless Mattel made a written demand for exclusion. Mattel filed the demand. In a proceeding before the Customs Service, Mattel's claim of infringement was denied, with the determination that the differences between the dolls were "not minuscule and distinguish [CDC's dolls] from [Mattel's] Barbie head sculptures. The total concept

and feel of the two protected Barbie head sculptures is not captured in [CDC's dolls]." Mattel disagreed with this determination and filed suit in federal court.

Lawsuit #1

Mattel sued Claudene and CDC for copyright and trade dress infringement in August 1997. Respondents represented Claudene and CDC. Claudene and CDC counterclaimed against Mattel including allegations of antitrust violations, unfair practices and malicious prosecution. The counterclaim alleged: "This counterclaim arises out of the illegal attempt by toy giant Mattel to crush a smaller competitor and take over its niche market. Rather than try to compete fairly, Mattel has expressed its intention of driving CDC out of business no matter what it costs, and CDC has no choice but to file this counterclaim to try to stop Mattel from further unfair competition."

Mattel moved for summary judgment on its affirmative claim as well as on CDC's counterclaim. The court denied the motion as to the affirmative claim, but granted summary judgment in favor of Mattel on the CDC counterclaims for federal and state antitrust violations, unfair business practices, attempt to monopolize under the Sherman and Cartwright Acts, malicious prosecution, and copyright, trademark, and trade dress misuse.³ The court found CDC's claim for antitrust to be "nothing more than pure conjecture" and that there was "absolutely no evidence to support its contentions" that Mattel caused it to lose business as CDC had alleged. The court issued orders on December 4, 1998 and January 22, 1999, totaling 45 pages setting forth a history of the case, factual findings, and conclusions of law.⁴

³ The district court initially granted Mattel's summary judgment motion as to all CDC's counterclaims except for unfair competition. Mattel moved for reconsideration and in January 1999, the district court acknowledged "its prior rulings were incorrect," and granted summary judgment on that remaining counterclaim.

⁴ These proceedings were before the Honorable A. Howard Matz, United States District Judge.

On February 9, 1999, the parties entered into a settlement of the first federal action. CDC agreed to pay Mattel \$100,000 and not to market dolls from one of its manufacturers once its existing inventory was depleted. Mattel agreed to dismiss the action with prejudice and to allow CDC to continue to sell dolls produced by the other manufacturer if CDC took certain specified steps to avoid confusion with the Barbie doll. The parties also agreed that Mattel could revoke this permission if CDC or any successor sued Mattel claiming any Mattel product infringed the facial sculpture of the CDC doll. The settlement agreement was executed by Mattel, CDC and Claudene, and approved as to form and content by James B. Hick, for Luce Forward on behalf of CDC and Claudene, and counsel for Mattel.

Lawsuit #2

Harry was not a signatory to the settlement agreement and on March 18, 1999, he filed suit in the federal court against Mattel, CDC and Claudene for copyright infringement and injunctive relief. He alleged that Mattel had copied CDC's toy doll head and sought \$2.4 billion in damages. In April 1999 Mattel filed a counterclaim against Harry, CDC and Claudene alleging causes of action identical to those it had asserted in the first federal action.

Lawsuit #3

Two days after filing the counterclaim in lawsuit #2, Mattel filed a complaint in federal court against Harry, Claudene and CDC alleging claims for copyright and trade dress infringement.

The Alleged Slander

In June 1999, after lawsuit #1 had been settled and while lawsuits #2 and #3 were pending, Claudene and Hicks appeared on a segment of the television program "EXTRA" entitled "The Barbie Controversy" and discussed the disputes between Mattel and CDC. The contents of the telecast were then posted on the "EXTRA" website.

Also in June 1999, Luce Forward published an article in a firm newsletter entitled “Doll Wars The Intellectual Property of Toys” by James B. Hicks, “a partner in the Business Litigation Practice Group” of Luce Forward and posted the article on its website. In September 1999, the article was published in the “San Diego MIT Enterprise Forum.”⁵

Summary Judgment and Sanctions Awarded to Mattel in Case #2

On January 6, 2000, the district court granted summary judgment in favor of Mattel on all of Harry’s claims in lawsuit #2.⁶ The court found no copyright infringement by Mattel. On the contrary, the court found that the dolls Harry claimed infringed on CDC copyrights “bear 1991 and 1976 copyright registration marks” and “were created using head sculptures created and copyrighted before the creation of the Claudene doll head in 1996.” The court found that Harry had been personally involved in the prior litigation and was present at the settlement conference. Concluding that the lawsuit was an attempt to “resuscitate the same claims settled in the prior suit against his daughter and the company of which he is co-founder and chief financial officer,” the court found that the “suit for copyright infringement is a sham suit.”

In addition to granting summary judgment, the court ordered sanctions of \$501,565 against Hicks to be paid to Mattel, stating: “This court finds that plaintiff’s counsel has filed a meritless claim against defendant Mattel. A reasonable investigation by Mr. Hicks would have revealed that there was no factual foundation for plaintiff’s copyright claim.” The court further found that in connection with the motion and discovery process Hicks “behaved boorishly, misrepresented the facts, and misstated the law.” Hicks appealed the sanction order.

⁵ There is no evidence that this organization has any connection to the Massachusetts Institute of Technology.

⁶ These proceedings were before the Honorable Nora M. Manella, United States District Judge.

Settlement of the Lawsuits

In May and June 2000, Harry and Claudene substituted themselves in propria persona in the place of respondents as their attorneys in lawsuits #2 and #3. On August 4, 2000, Claudene and Harry informed the federal court that both cases had been settled. Mattel filed a request for dismissal in exchange for an assignment of CDC's copyright interests in the Claudene doll face and head.

This Lawsuit and the SLAPP motion

On February 28, 2000, Mattel filed this lawsuit for slander, libel, trade libel, and unfair competition against respondents, Harry and Claudene. Mattel alleged that respondents had made a number of false and misleading statements on the "EXTRA" telecast, the "EXTRA" website, and in the Hick's authored article.

Hicks and Luce Forward filed motions to strike under the Anti-SLAPP Statute. They asserted that Mattel could not establish the probability of prevailing because the statements were absolutely privileged under Civil Code section 47, subdivision (c), as a "fair and true report" of a "public journal," were protected under the First Amendment, were "substantially true," were not defamatory, were not made by respondents, and because several of the statements were non-actionable opinions. Hicks and Luce Forward also asserted that the statements related to a matter of public concern and Mattel could not prove they were made with actual malice.

Mattel opposed the motions on the grounds that the statements were not protected by the Anti-SLAPP Statute because they were made in connection with sham litigation, the speech did not relate to a matter of public interest, and that Mattel had a probability of prevailing because defendants' statements were not privileged, were false and were made with actual malice.

The court granted the motion to strike, finding that the statements were absolutely privileged under Civil Code section 47, subdivision (d) as a true and fair report of judicial proceedings by a public journal.

Mattel filed a timely notice of appeal from the order granting the motion to strike.⁷

STANDARD OF REVIEW

An appellate court reviews the grant of a SLAPP motion de novo and uses its independent judgment to determine whether defendants acted in furtherance of their right of petition or free speech in connection with a public issue. (*Mission Oaks Ranch, Ltd., v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, revd. on other grounds in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10.) Whether appellant established a probability that it will prevail, that is, that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a judgment, is also a question of law and is determined de novo. (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.)

DISCUSSION

I. Did respondents meet their initial burden of demonstrating their conduct fell within the protection of the Anti-SLAPP Statute?

The purpose of the Anti-SLAPP Statute is to eliminate, at an early stage of the litigation, baseless lawsuits aimed at chilling the constitutional rights of free speech and petition. (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) The statute is set forth at section 425.16. Subdivision (a) of that section declares that “it is in the public interest to encourage continued participation in matters of public significance, and . . . participation should not be chilled through abuse of the judicial process.” It provides that the section be construed broadly.

A trial court can review a lawsuit to determine whether it is a SLAPP suit through a motion to strike: “A cause of action against a person arising from any act

⁷ An order granting a special motion to strike under the Anti-SLAPP Statute is appealable. (§ 425.16, subd. (j).)

of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue *shall be subject to a special motion to strike*, unless the court determines that the plaintiff has established that there is a *probability that the plaintiff will prevail on the claim.*" (§ 425.16, subd. (b)(1), italics added.)

As relevant here, an "act in furtherance of a person's right of petition or free speech" includes "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body" (§ 425.16, subd. (e)(2)) or "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

The defendant has the burden of making a prima facie showing that plaintiff complains about acts which were undertaken in furtherance of defendant's constitutional rights of speech and petition. (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364 (*Paul for Council*); *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 820.) If the defendant successfully meets its burden, plaintiff then has the burden of showing "a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Respondents contend their conduct was protected under section 425.16, subdivisions (e)(2) and (e)(4). The California Supreme Court has squarely held that if a defendant establishes that the statement was made in connection with an issue under consideration by a legislative, executive or judicial body under subdivision (e)(2), it is not necessary to separately demonstrate that the statements concerned an issue of public significance under subdivision (e)(4). (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at pp. 1116-1117.) Based on statutory analysis, legislative intent, and public policy considerations, the court concluded that the Legislature equated a "public issue" with "an issue under consideration or review by a legislative, executive, or judicial body." (*Id.* at p. 1114.)

Construing respondents' initial burden liberally, as section 425.16 directs, it is clear that respondents' statements regarding the infringement litigation between Mattel and CDC were "in connection with an issue under consideration . . . by a . . .

judicial body.” (§ 425.16, subd. (e)(2).) But Mattel contends that the statements were not protected because the statute does not protect illegal or illegitimate activity. Mattel, relying on *Paul for Council v. Hanyecz*, *supra*, 85 Cal.App.4th 1346, argues that statements regarding a lawsuit determined by the federal court to be a sham are not protected activity. But *Paul for Council* is inapposite and Mattel’s argument unpersuasive.

In *Paul for Council*, the plaintiff alleged that defendants interfered with his candidacy for City Council by making illegal campaign contributions to an opponent. Defendants moved to strike the complaint under the Anti-SLAPP Statute contending there was no probability plaintiff would prevail. Defendants’ moving papers reflected their having laundered campaign contributions in violation of the Political Reform Act. In opposition, plaintiff asserted that the Anti-SLAPP Statute did not protect defendants’ activities because laundering campaign money did not constitute constitutionally protected activity.

The Court of Appeal recognized that political campaign contributions are a type of political speech, but held that the Anti-SLAPP Statute was not intended to “give defendants section 425.16 protection from a lawsuit based on injuries they are alleged to have caused by their *illegal* campaign money laundering scheme” any more than “such protection would exist for them if they injured plaintiff while robbing a bank to obtain the money for the campaign contributions or while hijacking a car to drive the campaign contributions to the post office for mailing.” (*Paul for Council*, *supra*, 85 Cal.App.4th at pp. 1365, 1366.)

Mattel overlooks the admonition in *Paul for Council*: “In order to avoid any misunderstanding as to the basis of our conclusions, we should make one further point. This case . . . involves a factual context in which defendants have effectively conceded the illegal nature of their . . . activities for which they claim constitutional protection. Thus, there was no dispute on the point However, had there been a factual dispute as to the legality of defendants’ action, then we could not so easily have disposed of defendants’ motion. . . . If the plaintiff contests this point, and . . . cannot demonstrate as a matter of law that the defendants’ acts do not fall under section 425.16’s protection, then the claimed illegitimacy of the defendant’s acts is an

issue which the plaintiff must raise and support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case." (*Paul for Council, supra*, 85 Cal.App.4th at p. 1367.)

Respondents do not concede their statements were defamatory or that the second federal action was a sham. The findings by federal district judges that CDC's counterclaim in the first federal action was without merit and Harry's complaint in the second federal action was a sham, do not establish as a matter of law that respondents' acts are not protected by the Anti-SLAPP Statute.⁸

Paul for Council can be distinguished for yet another reason. The SLAPP motion there was directed at a complaint alleging damages from illegal activity, laundering campaign funds. Here, the complaint is directed at allegedly defamatory speech, activity that may subject one to civil liability but is not criminal.

We are satisfied that respondents met their initial burden of showing that the acts about which Mattel complains were undertaken in furtherance of their constitutional rights of speech and petition.⁹

⁸ We recognize that judicial notice can be taken of the truth of facts in documents such as orders, findings of fact and conclusions of law, and judgments. (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914.) However, the contents of sworn declarations or affidavits in a different lawsuit would be hearsay and inadmissible unless shown to fall within an exception. (See *Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688,692.) The doctrine of collateral estoppel is also inapplicable because all of the federal actions were settled and Hick's sanction award is pending appeal and thus not final. (*McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1145 [collateral estoppel only applies if the issues in the prior lawsuit were actually litigated and the former decision is final]; Rest.2d Judgments, § 27, com. e, p. 257 ["[I]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated"].

⁹ Having concluded that respondents made the requisite showing under section 425.16, subdivision (e)(2), we need not decide whether the statements were also related to a public issue under subdivision (e)(4). We note that matters of public interest may include activities involving private persons and entities, especially large powerful organizations which may impact the lives of many individuals. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 650.)

II. Did Mattel meet its burden of showing a probability that it would prevail?

Since respondents established the applicability of the Anti-SLAPP Statute, Mattel was required to establish a probability it would prevail on the claim. The Anti-SLAPP Statute employs the term “probability” but the courts have interpreted that term to simply require that the plaintiff present sufficient evidence to demonstrate a prima facie case. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 866.) “[T]he trial court’s consideration of the defendant’s opposing affidavits does not permit a weighing of them against plaintiff’s supporting evidence, but only a determination that they do not, *as a matter of law*, defeat the evidence.” (*Id.* at p. 867.)

The plaintiff must make the required showing by admissible, competent evidence within the personal knowledge of the declarant, with reference to the familiar standard applied to evidentiary showings in summary judgment motions. (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15.)

a. Were the Statements Made by Respondents Defamatory?

(1) Plaintiff’s Allegations of Defamation

Mattel complained of slander, libel, trade libel, false light and unfair competition against respondents, setting forth specific allegations of statements asserted to be false or misleading.

In order to determine whether Mattel established a probability it would prevail, we will examine each statement of which Mattel complains to determine whether it was defamatory.

The “EXTRA” telecast

Mattel complained of the following statements in the EXTRA telecast: (1) Mattel admitted that the cheerleader doll did not infringe on Barbie; (2) Mattel “filed suit” against CDC before the Customs Service; (3) Mattel filed suit against CDC to put it out of business; (4) Mattel caused the failure of CDC; (5) Mattel settled the first federal lawsuit to obtain Claudene and CDC’s promise not to sue Mattel for ruining its

business; (6) Mattel wanted to drive CDC out of business; (7) It was reasonable to sue Mattel for \$2.4 billion on a single copyright claim because “Mattel sells about \$2 billion in Barbie Products every year”; and, (8) Mattel copied Claudene’s doll design in 1998 when it updated Barbie.

Having viewed the “EXTRA” telecast,¹⁰ we find only two of the eight allegedly slanderous statements were actually made by Hicks. The other statements were made by someone other than Hicks, and cannot be charged to respondents. Claudene made the statements that Mattel admitted that the cheerleader doll did not infringe on Barbie (#1) and that Mattel “filed suit” against CDC before the Customs Service (#2). The “EXTRA” commentator made the statements that Mattel filed suit against CDC to put it out of business (#3), that Mattel settled the first federal lawsuit to obtain Claudene and CDC’s promise not to sue Mattel for ruining its business (#5), and that “Mattel copied Claudene’s doll design [in 1998], when it updated Barbie” (#8).

One of the alleged statements, “*Mattel caused the failure of CDC*” (#4), is not in the telecast.

The only statements that were actually made by Hicks were that “*Mattel wanted to drive CDC out of business*” and that “*it was reasonable to sue Mattel for \$2.4 billion on a single copyright claim because ‘Mattel sells about \$2 billion in Barbie product every year.’*”

The Hicks authored article

Mattel complained that the article, “Doll Wars – the Intellectual Property of Toys” contained the following slanderous statements: (1) Mattel decided to launch its own “University Barbie” in 1996, and shortly thereafter began claiming CDC dolls infringed Mattel’s Barbie doll; (2) Mattel pursued copyright claims against CDC before the Customs Service alleging CDC dolls infringed Mattel’s Barbie; (3) Mattel filed a

¹⁰ A videotape of the “EXTRA” telecast was part of the trial record before us on appeal.

new lawsuit against CDC in federal court again claiming infringement after CDC beat Mattel in Customs; (4) The federal judge “found evidence that Mattel did not in all honesty believe that CDC’s doll infringed on Barbie and that in initiating the action, Mattel may have simply been retaliating for CDC’s failure to acquiesce to Mattel’s terms”; (5) Mattel’s former employee testified that Mattel aggressively defends against any entries in the fashion doll business and “anyone who makes an 11½ inch fashion doll paints a target on their back”; (6) A month before trial, Mattel agreed to dismiss all of its claims and allow CDC to market its dolls; (7) Harry filed his own copyright suit against Mattel seeking \$2.4 billion on the grounds that Barbie’s heads and faces copied the CDC doll; and, (8) The “EXTRA” segment profiling the second federal action “questioned whether Mattel was playing by the rules.”

(2) Were the Statements Defamatory

A statement is *defamatory* if it imputes some negative characteristics to the plaintiff. (*Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 551.) A defamatory statement is one “which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” (Civ. Code, § 45.)

A defamatory statement must contain a statement of *fact*. (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600.) A statement of opinion “cannot be false and is outside the meaning of libel.” (*Tschirky v. Superior Court* (1981) 124 Cal.App.3d 534, 539), because “[u]nder the First Amendment there is no such thing as a false idea.” (*Milkovich v. Loraine Journal Co.* (1990) 497 U.S. 1, 18.) “[T]he dispositive question . . . is ‘whether a reasonable fact finder could conclude that the published statements imply a probably false factual assertion.’” (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1607.)

In order to rebut falsity or establish truth as a defense, “a defendant is not required to prove the literal truth of the allegedly defamatory statement in every detail, so long as the imputation is substantially true as to justify the ‘gist’ or the ‘sting’ of the statement.” (*Southwell v. Mallery, Stern & Warford* (1987) 194 Cal.App.3d 140, 145.) “‘If the substantial imputations be proved true, a slight inaccuracy in the

details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than the actual truth would.” (*Kurata v. Los Angeles News Pub. Co.* (1935) 4 Cal.App.2d 224, 227-228.) “In determining whether the report was fair and true, the article must be regarded from the standpoint of persons whose function is to give the public a fair report of what has taken place. The report is not to be judged by the standard of accuracy that would be adopted if it were the report of a professional law reporter or a trained lawyer.” (*Handelsman v. San Francisco Chronicle*, *supra*, 11 Cal.App.3d at p. 387.)

The “EXTRA” statements

Applying these principles to the two Hicks statements in the “EXTRA” telecast and the statements in the article, we make the following determinations:

As to the statement that Mattel has sales of \$2 billion in Barbie products annually, we find nothing defamatory. Mattel could not prevail against respondents based on this statement.

As for the statement that Mattel wanted to drive CDC out of business, Mattel established a prima facie case that it was defamatory. In the context of the televised segment, the statement suggested that Mattel wanted to use litigation and anti-competitive tactics to force CDC, a small company, out of business. The expression “drive out of business” suggests ruthless and inappropriate conduct and can only be described as pejorative. There was substantial evidence that this statement was false. In 1990, Mattel did not object to CDC’s sale of cheerleader dolls, expressly approving their sale by CDC. When Customs detained a shipment of CDC’s dolls, Mattel offered to permit their release under certain reasonable conditions necessary to protect Mattel’s copyright. When Mattel and CDC settled the first federal court action, Mattel agreed CDC could continue to sell certain dolls so long as CDC took steps to insure that Mattel’s rights would not be violated. A reasonable interpretation of these actions would not lead to the conclusion that Mattel wanted to “drive CDC out of business.”

The Hicks authored article

Most of the statements in the Hicks article are substantially true and therefore not slanderous: That “Mattel pursued copyright claims against CDC before the Customs Service alleging CDC dolls infringed Mattel’s Barbie” (#2), that “Mattel filed a new lawsuit against CDC in federal court again claiming infringement after CDC beat Mattel in Customs” (#3), that “the federal court found evidence that Mattel did not in all honesty believe that CDC’s doll infringed on Barbie and that in initiating the action, Mattel may have simply been retaliating for CDC’s failure to acquiesce to Mattel’s terms” (#4), that “Mattel’s former employee testified that Mattel aggressively defends against any entries in the fashion doll business and anyone who makes an 11 ½ inch fashion doll paints a target on their back” (#5), and that “Harry filed his own copyright suit against Mattel seeking \$2.4 billion on the grounds that Barbie’s heads and faces copied the DCD doll” (#7) and, that the “EXTRA” segment profiling the second federal action “questioned whether Mattel was playing by the rules” (#8).

But there are two statements for which a prima facie case of defamation has been established.

The first is statement #1, that Mattel decided to launch its own “University Barbie” in 1996, and shortly thereafter began claiming CDC dolls infringed Mattel’s Barbie doll. In the context of the article, statement #1 reasonably implies that Mattel copied the CDC cheerleader doll and then wrongfully went after CDC for copyright infringement. Mattel’s evidence was sufficient to sustain a judgment that prior to the creation of the Claudene doll head in 1996, Mattel had “created and copyrighted” the two doll heads Harry alleged infringed the Claudene doll copyright. Furthermore, Mattel prevailed in the federal court against CDC on both CDC’s counterclaim and claim of copyright infringement.

Mattel also established a prima facie case of defamation as to statement #6, that a month before trial, Mattel agreed to dismiss all of its claims and allow CDC to market its dolls. In the context of the article, this statement reasonably implied that Mattel dismissed its case because it did not want to go to trial and in the process gave in to CDC’s claims. It implied that Mattel filed the complaint without good cause and that CDC was the winner in the litigation between the two companies. Mattel’s

evidence was sufficient to establish a prima facie case that CDC has been decidedly unsuccessful in the litigation, and had paid \$100,000 to Mattel in settlement of the first federal lawsuit, and that Mattel permitted CDC to sell certain dolls on certain specified conditions. Although the resolution of the lawsuit was by settlement, it cannot reasonably be disputed that the conclusion of the lawsuit was in Mattel's favor and not CDC's, as the statement implies.

b. *Were the publications absolutely privileged under Civil Code section 47, subdivision (d)?*

Respondents assert that Mattel cannot establish a probability that it will prevail because the statements were absolutely privileged under Civil Code section 47, subdivision (d)(1). That section provides, in relevant part, that a statement is privileged if it is "a fair and true report in, or a communication to, a public journal, of . . . a judicial . . . proceeding, or . . . of anything said in the course" of such a proceeding. Subsection (d)(2)(A) specifically precludes application of this privilege to any communication to a public journal that violates rule 5-120 of the Rules of Professional Conduct.¹¹

The fair and true report privilege has been construed to be absolute. (See *McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal. App.3d 961, 974; see also *Conklin v. Sloss* (1978) 86 Cal.App.3d 241, 246.) In fact, "[e]ven when the print

¹¹ Rule 5-120, provides, as relevant here: "Trial Publicity. [¶] (A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. [¶] (B) Notwithstanding paragraph (A), a member may state: [¶] (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; [¶] (2) the information contained in a public record; [¶] (3) that an investigation of the matter is in progress; [¶] (4) the scheduling or result of any step in litigation; [¶] (5) a request for assistance in obtaining evidence and information necessary thereto; [¶] (6) a warning of danger concerning the behavior of a person involved, when there exists the likelihood of substantial harm to an individual or the public interest"

media publish an accurate report of a statement they *know to be false*, the protective cloak of [the fair and true report privilege] remains intact, not penetrated by a finding of malice. [Citations.]” (*McClatchy, supra*, p. 974.) While it is clear that the print media is protected by an absolute privilege, it is also clear that an attorney in violation of rule 5-120 of the Rules of Professional Conduct would not be. Mattel contends that respondents indeed were in violation of rule 5-120, rendering their statements unprotected by Civil Code section 47, subdivision (d).

Civil Code section 47, subdivision (d)(1) provides as follows: “A privileged publication or broadcast is one made: By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.”

In order to be protected by this privilege, a communication must be by or to a public journal and must also purport to be a report of an official public proceeding or of something said in the course of such a proceeding. (*Lewis v. Hayes* (1913) 165 Cal. 527, 530-531.) “The publication which the statute designates as privileged is a fair and true report of the facts; the statute does not include as privileged facts outside the record or comments by the writer.” (*Lyon v. Fairweather* (1923) 63 Cal.App.194, 197.)

The legislative history of Civil Code section 47 provides little guidance as to the meaning of the term “public journal.” The original form of the statute, enacted in 1872, used the term “newspapers” which was amended to “public journal” in 1895. (Stat. 1895, ch. 163, § 1, p. 167.) The legislative history regarding the amendment did not explain the reason for the change. (See Sen. J. (1895 Reg. Sess.) at pp. 576, 700, 1186-1187.)

The term “public journal” appeared in only one other place in California statutes. Former Penal Code section 1076 restricted the disqualification of potential jurors who formed or expressed opinions based on statements in “public journals.” (Pen. Code, § 1076, repealed by Stats. 1988, ch.1245, § 35.) In 1925, Penal Code section 1076 was amended by adding “circulars, or other literature” to public journals.

Case authority provides little discussion or analysis of what constitutes a “public journal,” although the privilege has been referred to as a “news media privilege” and most cases have assumed that the term refers to newspapers and magazines. (*Sipple, supra*, 71 Cal.App.4th at p. 242 [magazines]; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1050 [newspapers].) Television broadcasts have also been considered “public journals.” (See *Green v. Cortez* (1984) 151 Cal.App.3d 1068, 1073.)

“The privilege accorded reports of judicial and other official proceedings stems from the democratic nature of our government. In our society, the power resides with the People; public supervision of governmental administration through informed voting is the cornerstone of democracy. Hence: ‘The fair report privilege is required because of the public’s need for information to fulfill its supervisory role over government. Thus, reports of official proceedings are not privileged “merely to satisfy the curiosity of individuals,” but to tell them how their government is performing.”’ (*McClatchy Newspapers, Inc. v. Superior Court, supra*, 189 Cal.App.3d at pp. 974-975.)

“Public” has been defined as “exposed to general view: open . . . of, relating to or affecting all the people or the whole area of a nation or state . . . accessible to or shared by all members of the community” (Webster’s Collegiate Dictionary (10th ed. 2001) at p. 941.) “Journal” is defined as a “periodical dealing esp. with matters of current interest.” (*Id.* at p. 631.)

The First Amendment right to freedom of the press “is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.” (*Love v. Griffin* (1938) 303 U.S. 444, 452.)¹²

¹² “[A]llegedly libelous statements [which] would otherwise be constitutionally protected . . . do not forfeit that protection because they were published in the form of a paid advertisement.” (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 266.) (footnote continued on next page)

Nor is any particular form of language required to qualify as a public journal. In response to the argument that a newspaper article was not a fair and true report because it did not use the verbatim language of the complaint, the court in *Handelsman v. San Francisco Chronicle* (1970) 11 Cal.App.3d 381, 386 noted that “[t]he well recognized rule in this state, as elsewhere, is that the alleged defamatory matter must only be substantially in accord with the report in order to be entitled to the privilege of Civil Code section 47, subdivision 4. [Citations.]”¹³

(1) The “EXTRA” telecast and website are “public journals.”

In response to respondents’ contention that “EXTRA” is a public journal, Mattel argues that it is a “tabloid program” that does not purport to be in the business of disseminating general news to the public. No evidence was presented as to the usual content of “EXTRA’s” programming or the regularity of its broadcast. But it is undisputed that the program is presented on a regular basis over a major network. Based on the evidence before us, the segment purports to present a “fair and true” report of judicial proceedings. If “EXTRA” were the defendant, it is clear that it would enjoy “an absolute privilege under section 47, subdivision 4, to publish or broadcast, in a fair and true report, the allegedly defamatory statements of” respondents. (*Green v. Cortez, supra*, 151 Cal.App.3d at pp. 1074-1075.) *Green v. Cortez* involved statements, which were later determined to be untrue, allegedly made by a City Council person during official proceedings. The statements had been included in television broadcasts and other media that were then sued for slander. In affirming a demurrer sustained without leave to amend, the appellate court determined the media defendants enjoyed an absolute privilege. (*Ibid.*)

(footnote continued from previous page)

A paid announcement in a newspaper of general readership is protected by Civil Code section 47, subdivision (d)(1), as long as it “captures the substance of, and d[id] not deviate from, the allegations in” the complaint. (*Microsoft Corp. v. Yokohama Telecom Corp.* (C.D. Cal. 1988) 993 F.Supp.782 784.)

¹³ The fair and true report privilege was formerly Civil Code section 47, subdivision 4 but has been renumbered and is now subdivision (d)(1).

We conclude the evidence was sufficient to find that “EXTRA” was a “public journal” within the meaning of Civil Code section 47, subdivision (d), and any further dissemination of the telecast over the internet would have the same protection. (See *Pavlovich v. Superior Court* (2001) 91 Cal.App 4th 409, 419.) Despite this conclusion, the absolute privilege would not apply if the respondents’ statements violated rule 5-120 of the Rules of Professional Conduct. (Civ. Code, § 47, subd. (d)(2)(A).) It is necessary to assess the statement for which a prima facie showing of defamation has been made in accordance with the dictates of rule 5-120.

The statement was made and the telecast published after the first lawsuit had been settled and while the second and third suits were pending. Rule 5-120 of the Rules of Professional Conduct proscribes an attorney making extrajudicial statements that the attorney knows or reasonably should know will have a substantial likelihood of materially prejudicing the adjudicative proceedings.

Mattel did not establish that the statements would “have a substantial likelihood of materially prejudicing any adjudicative proceeding” in any matter between the two parties.” While it could be argued that potential jurors in the then pending federal lawsuits #2 and #3 could have been prejudiced by the statements, no evidence or argument was presented to support such a conclusion.

(2) The court erred in finding that the MIT newsletter and the Luce Forward newsletter and website were “public journals.”

The MIT Enterprise Forum

The only evidence as to the nature of the “The MIT Enterprise Forum” was a copy of the seven-page September 1999 issue in which the Hicks’ article was published. The publication explains the purpose of the Forum: “The Mission of the MIT Enterprise Forum is to encourage the growth and success of technology-based entrepreneurial businesses.” In addition to the president’s message there are three articles “spotlighting a sponsor,” the sponsors being The San Diego Daily Transcript and two law firms, one of which was respondent Luce Forward. The president’s message states that “ticket revenues [from Forum sponsored events] do not cover MIT Forum costs. The individuals and firms who sponsor us subsidize our continuing

growth and success and our practical contribution to the local economy in a very meaningful way.” We find the evidence insufficient to establish this publication is a public journal within the meaning of Civil Code section 47, subdivision (d)(1).

The Luce Forward newsletter and website

Respondents argue that the Luce Forward newsletter and website are public journals, notwithstanding its author had an interest in the litigation, or that it was presumably self-financed, or that its purpose was for profit, or that it was aimed at a particular audience. We do not agree.

We assume for purposes of this discussion that the newsletter and website are generally available to anyone in the public seeking access to information about the Luce Forward firm. While the newsletter and website purport to give fair and true information about litigation the firm is handling, based on the evidence before us, their obvious purpose was not to inform the public in a fair and true manner about its government, but to advertise the firm’s litigation prowess for the purpose of improving its image to solicit business. To that end, the information is clearly slanted in a way to cast a better light on themselves and their client and a worse light on the opposition. Certainly this is not the kind of reporting one would expect from an unbiased reporter.

It simply cannot be said that the nature and purpose of the newsletter and website satisfy the “[g]reat responsibility . . . placed on the news media to report fully and accurately the proceedings of government. . . . With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.” (*Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 491-492.) Entrusted with this great responsibility, news media in California enjoy absolute immunity for fair and accurate reports of government proceedings. Even a showing of malice would not defeat this privilege. It would be a travesty of the news media privilege to extend its protection to the Luce Forward newsletter and website posting.

c. Was there evidence of constitutional malice?

Respondents contend that Mattel cannot establish a prima facie case of defamation because it is a public figure and thus under the precepts of *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 must prove by clear and convincing evidence that respondents acted with actual or constitutional malice—knowledge of falsity or reckless disregard for truth or falsity. Because Hicks filed a declaration stating that he had no doubts about the truthfulness of his statements, respondents contend Mattel cannot meet its burden of proof. We disagree. If such a self-serving declaration alone could preclude a plaintiff from establishing actual malice, no public figure plaintiff could ever prevail against a SLAPP Motion.¹⁴

Hicks represented the CDC defendants in each of the three federal actions. He was their attorney in connection with the settlement agreement reached in Lawsuit #1. As such he knew or should have known that his statements regarding that settlement were inaccurate and misleading. This evidence was sufficient for Mattel to make out a prima facie case of actual malice.

CONCLUSION

We conclude that respondents' statements on "EXTRA" were privileged under Civil Code section 47, subdivision (d)(1) as fair and true statements in a public journal. In light of our determination that the MIT newsletter, the Luce Forward newsletter and website were not public journals, any defamatory statements contained in those publications were not privileged. Because Mattel has established a probability that it will prevail on at least one claim of defamation in the newsletters and website, the trial court erred in granting the motion to strike.

¹⁴ We assume without deciding that Mattel was a public figure.

DISPOSITION

The judgment is reversed. Appellant is awarded costs on appeal.

NOT FOR PUBLICATION.

_____, J.

TODD

We concur:

_____, P.J.

BOREN

_____, J.

NOTT